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IN THE

Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,

Petitioner,

v.

MICHAEL J. HASON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus National Association of Protection and Advocacy Systems (NAPAS), founded in 1981, is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands), P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all people with disabilities in a variety of

[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amicus curiae* and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

settings. In fiscal year 2001, P&As served well over 60,000 persons with disabilities through individual case representation and systemic advocacy.

The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&As are particularly active in providing assistance to persons with disabilities under the Americans with Disabilities Act ("ADA").

Because of its national P&A membership and familiarity with the protections afforded by each state to persons with disabilities, NAPAS has firsthand knowledge of the state laws and how they operate in practice. NAPAS is thus uniquely suited to assist the Court in understanding the state law backdrop against which Congress enacted the ADA as well as the status of that state law today.

INTRODUCTION AND SUMMARY

Title II of the ADA proscribes discrimination in the provision of public "services, programs, or activities." 42 U.S.C. § 12132. After an exhaustive investigation, Congress determined that such national legislation was required, expressly finding that discrimination in "the access to public services" persists in significant measure because persons with disabilities "have often had no legal recourse to redress such discrimination." *Id.* § 12101(a)(3), (4). As a result, Congress concluded that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis." *Id.* § 12101(a)(9).

In the face of these express statutory findings, petitioner nevertheless suggests in its opening brief that the legislative history of the ADA demonstrates that when it enacted the ADA, Congress believed that state law was generally sufficient to safeguard against the pervasive discrimination against people with disabilities with respect to public services. Pet. Br. 10 (the legislative record "tends to

demonstrate a congressional awareness that States were ahead of Congress in enacting prophylactic and remedial legislation for persons with disabilities") and 24 ("Congress was aware that, in many cases, the States were ahead of the Federal Government in protecting the rights of persons with disabilities."), citing *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 368 n.5 (2001).

Petitioner's error in these assertions is three-fold. First, petitioner ignores the clear legislative findings quoted above specifically referencing the pervasive discrimination in "public services." Such legislative findings, included in the statutory text, must be given greater weight than isolated statements selected from the vast legislative history. See, *e.g.*, *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 91 (2000) (noting that an examination of the legislative record is not necessary in all circumstances and striking down the ADEA in part because there were no statutory findings regarding state action).[2]

Second, the weight of legislative history is in line with the findings and contrary to petitioner's position. For example, the Fifty State Governors' Committees, on whose reports Congress relied, concluded that "existing State laws do not adequately counter such acts of discrimination." S. Rep. No. 101-116, 18 (1989). And petitioner's suggestion regarding the adequacy of state law conflicts sharply with the conclusions of the Senate Report that "State laws are

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[2] The legislative findings set forth in the ADA specifically identifying access to "public services" also distinguishes this case from this Court's recent decision in *Bd. of Tr. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 370–71 (2001), in which the lack of findings relating to public employment caused the Court to examine the legislative history more carefully with respect to Title I of the ADA. See also *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 212 (1997) ("We are not at liberty to substitute our judgment for the reasonable conclusion of a legislative body."); *Mansell* v. *Mansell*, 490 U.S. 581, 592 (1989) ("Congress is not required to build a record in the legislative history to defend its policy choices.").

inadequate to address the pervasive problems of discrimination that people with disabilities are facing." *Id.*

Third, putting aside the legislative history, an examination of the status of state discrimination law when the ADA was enacted demonstrates that Congress's express findings were correct. State law in 1990 provided inconsistent and inadequate coverage and remedies, seriously limiting the ability of many persons with disabilities to gain redress for discrimination. Although some states had enacted general legislation in some way addressing discrimination against people with disabilities, that state legislation did not, by and large, adequately cover such discrimination by the states in the provision of services—the specific form of discrimination prohibited by Title II.

It is this third point that we address in detail in this brief. We demonstrate below that when the ADA was enacted, only one state had explicit statutory protection comparable to Title II of the ADA in the areas we discuss below. Thus, contrary to the suggestions of petitioner, Title II was not unnecessary legislation enacted over a landscape of protective state law. It was, in fact, enacted to respond to the inadequate protection provided by the incomplete and porous patchwork of state laws.

First, half of the states simply failed to provide statutory protection against disability discrimination in the provision of state services. Although some of those states did have statutes prohibiting disability discrimination with respect to employment or public accommodations, they did not extend coverage to the state "services, programs, and activities" covered by Title II of the ADA.

Second, looking at the states that did proscribe disability discrimination in the provision of state services, the coverage was less than complete. For example, many of those states failed to provide coverage to all members of the class of persons that Congress expressly found had been "subjected to

a history of purposeful unequal treatment." 42 U.S.C. § 12101(a)(7). Over twenty states limited their coverage to persons with physical disabilities, thus leaving people with mental impairments with no legal recourse against such discrimination whatsoever. Several other states did not protect persons who are discriminated against, not because they have some disability, but because they have a record of some disability or are perceived as having such a disability.

In addition, the vast majority of the states did not have statutes that expressly required reasonable modifications to their services to assure that qualified citizens with disabilities could participate in and benefit from those services. Finally, where state laws did address disability discrimination in state services, they often did so in ways that denied potential claimants an effective remedy. Many state remedial schemes lacked adequate provisions for recovery of damages or attorney's fees, rendering them ineffective as both a remedy and a deterrent to continuing discrimination.

In short, when Title II of the ADA was enacted, only half of the states provided statutory protection with respect to discrimination in state services, and only one state provided statutory protections equivalent to those contained in Title II in each of the areas discussed above. Thus, in light of Congress's finding that such discrimination persisted, Title II was an appropriate response to the failure of state laws to remedy or deter such discrimination. As national legislation, Title II ensures that persons with disabilities have consistent protection against discrimination in the provision of state services, regardless of the state in which they reside.

We also demonstrate in Part II below that state law remains inadequate today. Absent Title II, enforcement of the rights of people with disabilities to access public services would be greatly diminished. Thus, not only was Congress acting to remedy significant gaps in state anti-discrimination laws when it enacted the ADA, but the continuing vitality of Title

II of the ADA is essential to secure the guarantee of equal protection and due process for all persons with disabilities.[3]

ARGUMENT

I. When the ADA Was Enacted, Individual State Laws Failed To Protect Persons with Disabilities Against Discrimination in the Provision of State Services.

A. Coverage of State Services

Title II of the ADA prohibits public entities from discriminating on the basis of disability in the provision of their services. Specifically, Section 202 provides that:

> "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Since 1990, plaintiffs have relied on Title II to challenge discriminatory acts involving core governmental functions, including voting,[4] institutionalization,[5] access to state courts,[6]

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[3] In this brief, we rely heavily on the work of Professors Ruth Colker and Adam Milani in a recent article in the Alabama Law Review. Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075 (2002). This article surveys current state law in detail and concludes that absent the protections of Title II of the ADA, the protection available to persons with disabilities would be greatly diminished in a majority of states. In an appendix to the article, the authors attach a comprehensive state-by-state summary of state disability law as it relates to Title II of the ADA.

[4] See, *e.g.*, *New York* v. *County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000) (failure to ensure that polling places were accessible to people with disabilities violated Title II); *Doe* v. *Rowe*, 156 F. Supp. 2d 35 (D.Me. 2001) (overbroad exclusion of individuals with mental illness from voting violated Title II).

[5] See, *e.g.*, *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

education,[7] prisoners' rights,[8] law enforcement,[9] and public assistance programs.[10] By ensuring that individuals with disabilities have access to these types of basic public services, programs and activities, Title II of the ADA has enabled them to participate as equal citizens in the most fundamental aspects of our society. Before the ADA was enacted, many state laws failed to address the exclusion of people with disabilities from these and other important government services—and their consequent isolation from public life and inability to participate fully in the rights and privileges of citizenship. Had Congress not enacted Title II, many people with disabilities would have remained second-class citizens, unable to cast a ballot, attend school or state universities, or receive public assistance benefits.

Consistent with Congress's findings regarding the inadequacy of state law, when the ADA was enacted, only half of the states provided statutory protection against disability discrimination in the provision of such fundamental public services and programs. In the states which did offer such protection, the statutes often took the form of "public accommodation" laws that could be interpreted to cover state

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[6] See, *e.g.*, *Popovich* v. *Cuyahoga County Ct. Com. Pl.*, 276 F.3d 808 (6th Cir. 2002) (deaf plaintiff sued Ohio to obtain sign-language interpreter in child custody case), *cert. denied*, 123 S. Ct. 72 (2002).

[7] See, *e.g.*, *Wong* v. *Regents of Univ. of Cal.*, 192 F.3d 807 (9th Cir. 1999) (disabled student sued to require university to make reasonable modification).

[8] See, *e.g.*, *Pa. Dep't of Corr.* v. *Yesky*, 524 U.S. 206 (1998) (Title II applies to state correctional facilities).

[9] See, *e.g.*, *Barnes* v. *Gorman*, 536 U.S. 181 (2002) (plaintiff sued police department for injuries sustained while being transported in a van not equipped to hold a wheelchair).

[10] See, *e.g.*, *Lovell* v. *Chandler*, 303 F.3d 1039 (9th Cir. 2002) (exclusion of persons with disabilities from state health insurance program violated Title II).

services. For example, New Mexico had a statute forbidding any person, specifically including the state, "in any public accommodation" from discriminating in "offering or refusing to offer its services, facilities, accommodations or goods to any individual because of . . . physical or mental handicap." N.M. Stat. Ann. §§ 28-1-7(f) and 28-1-2(A) (1990).[11] Thus, we assume that a claimant could sue the state if it were discriminating against that individual with respect state services (or programs or activities) because of his or her disability.

Half of the states, however, had no such statutory protection. First, the public accommodation statute in three states—Arizona, Kentucky, and Tennessee—did not cover persons with disability at all.[12] In these states, the statutes covered discrimination on the basis of sex, national origin and the like but left persons with disabilities without protection.

Second, in thirteen states, the general public accommodation statute either did not cover or was not enforceable against the state. For example, in Mississippi, the only penalty for a violation of the statute was a misdemeanor which would not be enforceable against the state. See Miss. Code Ann. § 43-6-11 (1990).[13] In other states, the types of public accommodations covered by the statute did not

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[11] In this brief, all citations to statutes are taken from the online databases on either Westlaw or Lexis. The citations to historical statutes were taken from the databases on those services for the year identified. Citations to current law are taken from the current statute databases and identified as 2003.

[12] See Ariz. Rev. Stat. § 41-1441 (1990); Ky. Rev. Stat. Ann. § 344.120 (1990); Tenn. Code Ann. § 4-21-501 (1990).

[13] See also Ala. Code § 21-7-5 (1990) (only penalty a misdemeanor); Ark. Code Ann. § 20-14-302 (1990) (same); Ga. Code Ann. § 30-3-6 (1990) (same); Idaho Code § 39-3210 (1990) (same); Ind. Code Ann. § 35-46-2-1 (1990) (same); Neb. Rev. Stat. § 20-129 (1990) (same); Utah Code Ann. § 26-30-4 (1990) (same); Wyo. Stat. Ann. § 35-13-203 (1990) (same).

expressly include state-run accommodations such as public libraries or other buildings or facilities. See, *e.g.*, Cal. Civ. Code § 51 (1990) (prohibiting discrimination on the basis of physical disability by "business establishments") and *Black* v. *Department of Mental Health*, 100 Cal. Rptr. 2d 39, 42 n.4 (Cal. Ct. App. 2000) (declining to address the lower court's ruling that the state was not covered by the act).[14]

Finally, nineteen states had statutes prohibiting disability discrimination with respect to general public accommodations, but unlike New Mexico, these statutes did not cover "services." For example, Washington had a statute prohibiting any person from committing an act which "results in any distinction, restriction, or discrimination . . . in any place of public resort, accommodation, assemblage, or amusement" regardless of disability. Wash. Rev. Code Ann. § 49.60.215 (1990). As in New Mexico, the term "person" was defined to include the state. See Wash. Rev. Code Ann. § 49.60.040 (1990). But the statute did not prohibit such discrimination in the provision of services or programs or activities. To the contrary, in *Fell* v. *Spokane Transit Authority*, 911 P.2d 1319, 1329 (Wash. 1996), the court held that the statute could not be interpreted to cover transportation services offered by the city. The Court held that:

> "What must be very clear . . . is that the [state] statutory mandate to provide access to places of public accommodation is not a mandate to provide services. While entitlement to services may be in the ADA, the

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[14] See also Del. Code Ann. tit. 6, § 4501 (1990) and Del. Op. Atty. Gen. No. 00-IB09 (May 30, 2000), 2000 WL 1092966 (Del. A.G.) (state is not covered by statute); N.H. Rev. Stat. Ann. § 155:39-b (1990) (providing a narrow definition of "public accommodation" that does not expressly include the state); Wis. Stat. Ann. § 101.22(1m)(bp) (1990) (providing definition of public accommodation that does not expressly include the state).

> Legislature has not enacted a counterpart to the ADA in Washington creating such entitlements." *Id.*[15]

Thus, in Washington, state buildings that accommodate the public may be covered by the statute, but none of the services provided by the state would be.

Of the nineteen states that failed to cover discrimination in the provision of services, ten also failed to cover the state (and hence have already been counted in the thirteen states listed above).[16] Nine additional states, including Washington, had statutes that did cover the state, at least with respect to its buildings and facilities, but failed to cover services.[17]

Adding up the three states that had statutes that did not cover disability discrimination, the thirteen states that had statutes that did not cover the state, and the nine additional states that did cover the state but did not cover services, there were twenty-five states that failed to provide statutory protection against disability discrimination with respect to state services.

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[15] See Coker and Milani, 55 Ala. L. Rev. at 1093–94, for discussion of case and similar case in Ohio.

[16] See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Del. Code Ann. tit. 6, § 4501 (1990); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-3201 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); Utah Code Ann. § 26-30-1 (1990); Wis. Stat. Ann. § 101.22(9)(a) (1990); Wyo. Stat. § 35-13-201 (1990).

[17] Fla. Stat. Ann. § 413.08(1) (1990), see also Fla. Stat. Ann. § 393.13 (1990) (covering services discrimination with respect to narrowly defined population of "developmentally disabled"); Me. Rev. Stat. Ann. tit. 5, § 4551 (1990); Md. Ann. Code art. 49B, § 7 (1990); N.Y. Exec. Law § 296(2)(a) (1990); Ohio Rev. Code Ann. § 4112.02 (2002) (historical text unavailable), see also *Davis* v. *Flexman*, 109 F. Supp. 2d 776 (S.D. Ohio 1999) (holding that statute applied to facilities and not services); N.D. Cent. Code § 48-02-19 (see historical notes in 1991 database); Tex. Hum. Res. Code Ann. § 121.001 (1990); Vt. Stat. Ann. tit. 9, § 4502 (1990).

B. Limitations in Coverage of State Services

Having established that only twenty-five states had any form of statutory protection against disability discrimination in the provision of state services, we now turn to the various limitations in that protection as compared to what Congress deemed necessary in Title II the ADA. As we demonstrate below, many of the statutes failed to cover critical populations of persons with disabilities. They also by and large failed to require that states make reasonable modifications in such services to ensure that persons with disabilities would not be denied the benefits of such services. Finally, we show that in many of the states, the remedies were inadequate to address the problem of discrimination effectively.

1. Definition of Persons with Disabilities

A critical step in prohibiting discrimination on the basis of disability is to define the protected class with sufficient breadth. Persons with both physical and mental impairments have long suffered discrimination in this country. So too have persons who have a record of impairment or who are regarded as having such an impairment.

Congress recognized that all such persons need protection against discrimination when it enacted the Rehabilitation Act of 1973 and the 1978 amendments thereto. See 29 U.S.C. § 794 and historical notes. Moreover, by 1990, this Court had similarly recognized the importance of these elements. In *City of Cleburne*, this Court noted that persons with mental disabilities are often the subject of discrimination on the basis of "negative attitudes and fear." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985) (holding that the city council's denial of a special use permit under a zoning ordinance that prevented a home for persons with mental impairments was unconstitutionally discriminatory under the Fourteenth Amendment). Indeed, the holding in *Cleburne* itself demonstrates the occurrence of

unconstitutional discrimination in the provision of public services against persons with mental impairments.

It is also clear that invidious discrimination can be aimed at persons who, though not currently disabled, have a record of disability or are regarded as having such a disability. Indeed, in *School Board* v. *Arline*, 480 U.S. 273, 284 (1987), this Court recognized that by including both having a "record of" disability and being "regarded as" having a disability in the definition of disability in the Rehabilitation Act, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."

In light of this history, it is not surprising that Congress incorporated these elements into the definition of "disability" in the ADA. Thus, Section 3(2) of the ADA defines "disability" to mean:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> "(B) a record of such an impairment; or
>
> "(C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Looking at the landscape of state law in 1990, however, several states failed to incorporate these critical categories. For example, Nevada and Kansas each had statutes that prohibited discrimination in the provision of services, but their coverage of persons with disabilities was limited to those with "physical and visual" impairments (Nev. Rev. Stat. Ann. § 651.070 (see historical notes in 1991 database) or those with a "physical handicap" (Kan. Stat. Ann. § 44-1009(c)(3) (1990)). Similarly, South Carolina prohibited discrimination against persons because of "handicap" but

specifically excluded persons with "mental illness." See S.C. Code Ann. §§ 43-33-520, 43-33-560 (1990).[18]

In addition, twelve of the states that prohibited disability discrimination in the provision of public services failed to include in the protected class persons who are "regarded as" having an impairment and persons who have a "record of" an impairment.[19] Desiring to put an end to discrimination based

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[18] The exclusion of persons with mental impairments was also pervasive in states, including California, which did not cover discrimination in the provision of state services as listed in Part A above. See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Cal. Civ. Code § 51 (1990) (only covering physical disability) and Cal. Gov't Code § 12944 (1990) (specifically relating to licensing boards but only covering "medical conditions or physical handicap" and not "mental handicap"); Del. Code Ann. tit. 6, § 4501 (1990); Fla. Stat. Ann. § 413.08(1) (1990) and Fla. Stat. Ann. § 393.13 (1990) (covering narrowly defined population of developmentally disabled); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-3201 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); N.D. Cent. Code § 48-02-19 (see historical notes in 1991 database); N.H. Rev. Stat. Ann. § 354-A:3 (1990) (excluding illness from the definition of "physical or mental disability"); Utah Code Ann. § 26-29-2 (1990); Wis. Stat. Ann. § 101.22(1m)(b) (1990) (covers narrowly defined population of developmentally disabled); Wyo. Stat. Ann. § 35-13-201(a) (1990).

[19] See Conn. Gen. Stat. Ann. § 46a-64 (1990); Iowa Code Ann. § 601A.2 (1990); Kan. Stat. Ann. § 44-1002 (1990); Mass. Gen. Laws ch. 272, § 98 (see historical notes in current statute); Mich. Comp. Laws § 37.1103 (1990); Mo. Rev. Stat. § 213.010 (1990) (definitions do not include "record of"); Mont. Code Ann. § 49-2-101 (1990) (according to 1991 statute annotation, until 1991 amendment neither group included in definitions); N.J. Stat. Ann. § 10:5-5 (1990); Nev. Rev. Stat. Ann. § 651.050 (1990) (according to 1989 Westlaw database and annotations to current statute, neither group was included in this statute or any others relating to persons with disabilities); 43 Pa. Cons. Stat. Ann. § 954 (1990) (neither group included until this statute was amended in 1991); S.C. Code Ann. § 43-33-560 (1990); Va. Code Ann. § 51.5-3 (1990) (definitions do not include "regarded as").

Another eighteen states that did not have protection with respect to the state services also failed to include these elements in their definition of

on such "accumulated myths and fears," Congress drafted the ADA to include protection for both groups. See 42 U.S.C. § 12102(2).

2. Reasonable Modification

Another significant problem with many state statutes was their failure to require that the states make even simple modifications to their services and programs to avoid excluding persons with disabilities from participating in or enjoying the benefits of such services and programs. In passing the ADA, Congress recognized that such a requirement was essential to ensure discrimination could not persist under false rationales. See, *e.g.*, *US Airways, Inc.* v. *Barnett*, 122 S. Ct. 1516, 1522–23 (2002) (recognizing that the ADA "seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life").

Thus, Title II of the ADA specifies that "qualified individual[s] with disability[ies]" shall not be "excluded from participation in or be denied the benefits of" such services by reason of their disabilities. 42 U.S.C. § 12132. In turn, a "qualified individual with a disability" is defined to be a person who,

> "with or without *reasonable modifications* to rules, policies, or practices, the removal of architectural,

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disabled with respect to discrimination in public accommodations. See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Cal. Gov't Code § 12926 (1990); Del. Code Ann. tit. 6, § 4501 (1990); Fla. Stat. Ann. § 413.08 (1990); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-4126 (1990); Ind. Code Ann. § 22-9-1-3(r) (1990); Me. Rev. Stat. Ann. tit. 5, § 4553 (1990); Md. Ann. Code art. 49B, § 5 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); N.H. Rev. Stat. Ann. § 354-A:3 (1990); Tex. Hum. Res. Code Ann. § 121.002(4) (1990); Utah Code Ann. § 26-29-2 (1990); Wash. Rev. Code Ann. § 70.84.010 (1990); Wis. Stat. Ann. § 101.13 (1990); Wyo. Stat. Ann. § 35-13-201(a) (1990).

> communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2) (emphasis added).

The Attorney General's regulations issued pursuant to Section 204(a), 42 U.S.C. § 12134(a), interpret this definition to require a public entity to

> "make *reasonable modifications* in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (emphasis added).

Thus, Title II requires that public entities, including states, make "reasonable modifications" to their policies, practices, and procedures in order to insure that persons with disabilities can participate in and benefit from public services.

Nevertheless, when Congress enacted Title II, only four of the twenty-five states that had a statutory prohibition against disability discrimination in state services incorporated an express obligation to make such modifications with respect to such services.[20]

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[20] Minn. Stat. Ann. §§ 363.03(3)(2), (4)(1) (see historical notes in 1991 database), Mo. Ann. Stat. § 213.010(8) (1990), N.C. Gen. Stat. § 168A-3(10)(b) (1990); S.D. Codified Laws § 20-13-23.7 (1990) Four other states had statutes incorporating the "programs and activities" language from the Rehabilitation Act. See Haw. Rev. Stat. Ann. § 368-1.5(a) (1990); La. Rev. Stat. Ann. § 46:2254 (1990); Mass. Gen. Laws Ann. Const. Amend. CXIV (see historical notes in 1991 database); Va. Code Ann. § 51.5-40 (1990). We note that courts in these states, like this court, could interpret such language to require reasonable modification, so the lack of a specific statutory requirement may be less troubling in those

3. Remedies

The final issue we address is that of remedies. In passing Title II, Congress recognized that without an effective remedial scheme, Title II would have little impact on the pervasive discrimination existing at the time. Thus, Title II of the ADA incorporates by reference the enforcement provisions under Section 505 of the Rehabilitation Act, 29 U.S.C. § 794a (which themselves are based on the remedies applicable to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*). See 42 U.S.C. § 12133. Under this scheme, plaintiffs may obtain injunctive relief, damages, and attorney's fees.

The remedies available under state law in 1990 were substantially more limited. First, taking the same twenty-five states that did provide statutory protection against disability discrimination in the provision of state services, six failed to provide for damages as a remedy for violations by the state (even to remedy and deter intentional discrimination)[21] and another four significantly limited such damages.[22]

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states. See *Alexander* v. *Choate*, 469 U.S. 287, 300 (1985) (construing statute to mean that "while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones").

[21] Colo. Rev. Stat. Ann. §§ 24-34-306, -605 (1990) (no compensatory relief); Conn. Gen. Stat. Ann. § 46a-64(c) (1990) (no private right of action); N.M. Stat. Ann. §§ 28-7-3 (1990) (injunctive relief only); 28-7-5 (1990) (misdemeanor only); N.C. Gen. Stat. § 168A-11(b) (1990) (no damages); Oklahoma (no statute allowing damages for discrimination based on disability); S.D. Codified Laws § 20-13-23 (1990).

[22] Kan. Stat. Ann. § 44-1005(k) (1990) (limited compensatory damages to $2,000); Nev. Rev. Stat. Ann. § 651.090(1) (see historical notes in the 1991 database) (Section 41.035 imposes a $50,000 limit on tort damages against state and state employees); S.C. Code Ann. § 43-33-540 (1990) (limits actual damages to $5,000); W. Va. Code Ann. §§ 5-11-13(c); 5-11-10 (see historical notes in 1991 database) (while compensatory damages are available in court, a complainant in an administrative proceeding

Second, of the twenty-five states that covered services six did not allow successful plaintiffs to obtain attorney's fees for claims involving services or facilities.[23] Without the availability of such an award, enforcement is substantially limited, especially where the relief sought does not otherwise entail damages.

* * *

Having examined each of these limitations, only Minnesota had statutory protections in the areas we have discussed at least as strong as those Congress deemed adequate to ensure that persons with disabilities be able to enjoy the benefits of critical state services, programs and activities. And while some states' statutory protections may have been "ahead" of the federal government in 1990, it can hardly be said that Congress enacted the ADA, and Title II in particular, against a backdrop of sufficient or effective state laws.

II. Invalidating Title II of the ADA Would Severely Undermine the Protections Currently Afforded to Persons with Disabilities in a Majority of States.

Unfortunately, since the enactment of the ADA, only a few states have improved their disability statutes with respect to state services. As a recent study in the University of Alabama Law Review concludes, "Our study confirms . . . [that] only a minority of states actually have statutory protection against disability discrimination . . . similar to that found in ADA

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could only receive incidental compensatory damages, the modern equivalent of $1,000 in 1977).

[23] See Colo. Rev. Stat. Ann. §§ 24-34-605; 24-34-306 (1990); Conn. Gen. Stat. Ann. §§ 46a-97 to 46a-125 (1990) (no private right of action for discrimination against persons with disabilities); Kan. Stat. Ann. § 44-1005 (1990); Pennsylvania (section in current law allowing attorney's fees, see 43 Pa. Cons. Stat. Ann. § 962(c.2) (2003), was added in 1991); R.I. Gen. Laws § 42-87-4 (1990); S.D. Codified Laws § 20-13-24 (1990).

Title II."[24] Thus, since the enactment of the ADA, only four states—Kentucky, Maine, North Dakota and Vermont—have added statutes that prohibit the state from discriminating in the provision of its services,[25] and only two states—Kentucky and South Dakota—have revised their remedial provisions to allow damages against the state for violations of such statutes.[26] Similarly, while eight states broadened their definition of disability to cover at least some persons with mental impairments,[27] and ten states have done so to include those with a record of impairment or who are regarded as having an impairment,[28] over twenty states still have definitions of disability more limited than the ADA.

Thus, the need for Title II of the ADA is as real now as it was in 1990. There can be no assurance that the state legislatures which have not acted since 1990 would act now to rectify the deficiencies in their laws if this Court were to strike down Title II as applied to the states. Yet

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[24] Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075, 1113 (2002).

[25] Ky. Rev. Stat. Ann. §§ 344.120; 344.130 (2003); Me. Rev. Stat. Ann. tit. 5, §§ 4592, 4553 (2003); N.D. Cent. Code §§ 14-02.4-14, 14-02.4-15 (2003); Vt. Stat. Ann. tit. 9, §§ 4502(c); 4501(1) (2003).

[26] Ky. Rev. Stat. Ann. § 344.450 (2003); S.D. Codified Laws § 20-13-35.1 (2003).

[27] Ariz. Rev. Stat. Ann. § 41-1492 (2003); Cal. Gov't Code § 12926 (2003); Del. Code Ann. tit. 6, § 4502 (2003); Kan. Stat. Ann. § 44-1002 (2003); Ky. Rev. Stat. Ann. § 344.010 (2003); Nev. Rev. Stat. Ann. § 651.050 (2003); N.H. Rev. Stat. Ann. § 354-A:2 (2003); Wis. Stat. Ann. § 106.52(c) (2003).

[28] Ariz. Rev. Stat. Ann. § 41-1492 (2003); Cal. Gov't Code § 12926 (2003); Kan. Stat. Ann. § 44-1002 (2003); Ky. Rev. Stat. Ann. § 344.010 (2003); Me. Rev. Stat. Ann. tit. 5, § 4553 (2003); Mo. Rev. Stat. § 213.010 (2003); Mont. Code Ann. § 49-2-101 (2003); Nev. Rev. Stat. Ann. § 651.050 (2003); 43 Pa. Cons. Stat. Ann. § 954 (2003); Wis. Stat. Ann. § 106.52(c) (2003).

discrimination against persons with disabilities will not simply go away. Accordingly, the comprehensive coverage and remedies available under Title II the ADA are vital to the protection of persons with disabilities and many persons with disabilities will be harmed if these protections are taken away.

CONCLUSION

For the reasons set forth in the Brief for Respondent and above, this Court should affirm the judgment of the court of appeals.

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